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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Revision of Part 22 and)
Part 90 of Commission's Rules)
to Facilitate Future)
Development of Paging Systems)
)
Implementation of)
Section 309(j) of the)
Communications Act --)
Competitive Bidding)
)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

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**COMMENTS OF AIRTOUCH PAGING ON THE
NOTICE OF PROPOSED RULEMAKING**

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SUMMARY

AirTouch Paging ("AirTouch") is commenting on the market area licensing proposal for paging services. The comments are organized in the same fashion as the Notice of Proposed Rulemaking, with answers to the questions posed being given under the descriptive headings developed by the Commission itself.

Generally, AirTouch supports the use of MTA-based, simultaneous, multiple-round auctions for paging, provided that the market-by-market, channel-by-channel stopping rule proposed by the Commission is adopted to prevent the auctions from becoming interminable.

In certain respects, changes or refinements of the Commission's proposal are advocated:

- o Carriers which now serve a high percentage of an MTA population (i.e., 70%) should be subject to a streamlined procedure enabling them to secure the wide area license with a minimum of delay.

- o The Commission should grandfather all existing 900 MHz paging stations with fixed mileage radius service and interference contours as now defined in Part 22 of the rules for 931 MHz stations. The proposed formulas for 900 MHz should not be adopted because they are inaccurate and implementing them for

pre-existing sites would be excessively burdensome. If new filings are to be based upon a formula, AirTouch endorses the Comp Comm, Inc. formulation included as Attachment 1 of these comments.

- o 929 MHz PCP licensees should be allowed to complete the construction faa nationwide systems that already have been authorized and retain exclusivity rights as provided int he current rules.

- o Applicants should be required to identify every specific channel in each MTA on which they desire to bid, and to make an additional upfront payment for each listing in order to assume a seriousness of purpose and avoid "phantom" mutual exclusivities.

- o In order to maintain the level playing field upon which the paging business has thrived, bidding credits and other preferences should not be accorded to any selected groups of bidders.

- o Winning bidders should be required to serve 10% of the MTA population in their first year of operation, in addition to meeting the 3 year (1/3 of the population) and 5 year (2/3 of the population) benchmarks proposed by the Commission. The vague alternative "substantial service" standard should be dropped.

TABLE OF CONTENTS

I.	Preliminary Statement	1
II.	The Geographic Licensing Proposal	7
	A. Nationwide Channels	8
	B. Shared PCP Channels	13
	C. Service Area	15
	D. Treatment of Incumbents	16
	E. Coverage Requirements	17
	F. Co-Channel Interference Protection	21
	G. Maximum Power and Height-Power Limits	27
	H. Border Areas	27
	I. Eligibility	28
	J. Channel Aggregation Limit	30
III.	Competitive Bidding Issues	31
	A. License Grouping	32
	B. Bidding Procedures	34
	C. Anti-Collusion Rules	37
	D. Pre-auction Application Procedures	40
	E. Amendments and Modifications	43
	F. Upfront Payments	43
	G. Other Auction Procedures	45
	H. Transfer Disclosure Requirements	46
	I. Treatment of Designated Entities	47
IV.	Conclusion	50

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NOTICE OF PROPOSED RULEMAKING**

AirTouch Paging ("AirTouch"), by its attorneys, hereby files its Comments on the market area licensing proposal for paging channels set forth in the Notice of Proposed Rulemaking, FCC 96-52, released February 9, 1996 (the "Notice") in the above-captioned proceeding.^{1/} The following is respectfully shown:

I. Preliminary Statement

1. AirTouch is one of the largest providers of paging services in the United States. AirTouch has over 2.3 million paging units in service and provides

^{1/} AirTouch Paging earlier submitted Comments on the Interim Licensing Proposal. See Joint Comments on Interim Licensing Proposal filed by AACS Communications, Inc., AirTouch Paging et al. filed March 1, 1996; Reply Comments of AirTouch Paging on the Interim Licensing Proposal filed March 11, 1996.

service in 167 MSAs. AirTouch has licenses and major systems operating in every paging band (low band, VHF, UHF and 900 MHz), and on both shared and exclusive private carrier paging ("PCP") frequencies. AirTouch also has been a successful participant in the prior auctions of nationwide and regional narrowband PCS spectrum.^{2/} Based on the foregoing, AirTouch has a significant interest in this proceeding, and extensive licensing and auction experience which provides it with a substantial basis for informed comment.

2. Generally, AirTouch supports the Commission's efforts to adopt a market-area licensing plan utilizing auctions for paging channels. AirTouch has long advocated the use of larger rather than smaller market area designations in the licensing of narrowband services, such as narrowband PCS and paging, because regional, multi-state and nationwide services have become the hallmark of the paging industry.^{3/} There are, however, several overarching issues that the

^{2/} Through its parent, AirTouch Communications, AirTouch also was a participant and a winner in the broadband PCS auctions through a joint venture, PCS PrimeCo.

^{3/} For example, AirTouch was a leading advocate of making some of the narrowband PCS channels available on a nationwide basis, and a major architect of the five region plan that the Commission adopted with regard to the regional narrowband PCS channels.

Commission must keep in mind in making this transition to market area licensing.

3. First, in order to accomplish the worthy Commission objective of having "competitive success [be] dictated by the marketplace, rather than by regulation",^{4/} the Commission must get the final market area licensing rules in place immediately before irreparable harm occurs to consumers. As has been documented in detail in the many comments submitted on the Interim Licensing Proposal at issue in this docketed proceeding, the paging industry is in an explosive growth phase.^{5/} Substantial public harm will result if there is any appreciable delay in the ability of incumbent and newcomer paging companies to license the systems that are necessary to meet subscriber demands.^{6/}

4. Second, the Commission must adopt a reasoned licensing scheme which avoids artificial

^{4/} Notice, para. 2.

^{5/} It is generally recognized that the industry is growing between 25-35% per annum with some participants growing at rates exceeding 50% per annum. As AirTouch and others mentioned in their Comments, rigid interim rules will stop geographic expansion of local systems and will also cause substantial degradation of service if it continues for any length of time.

^{6/} One manufacturer, Glenayre, has publicly indicated that the current freeze has had a substantial adverse financial impact on it.

mutual exclusivities that will delay the licensing process. The Notice properly recognizes that "there is relatively little desirable spectrum that remains available for licensing" on the Part 22 paging frequencies.^{7/} The same is true on certain of the private carrier paging channels where the exclusive VHF and 900 MHz PCP channels show a scarcity of white space. Under these circumstances, it would be a serious mistake to adopt a market area licensing plan that stops incumbents from expanding existing systems for an indefinite period of time awaiting an auction proceeding in which no interest in the incumbent's channel materializes.^{8/} In this regard, AirTouch is particularly concerned that the prior auction procedures incited applicants to specify an interest in "all" available channels when in fact many applicants had actual interests that were much more limited in scope. The following Comments suggest a variety of mechanisms for the Commission to avoid

^{7/} Notice, para. 13.

^{8/} As AirTouch and others pointed out in their earlier Comments, the Commission must balance the public interest in reduced paperwork, revenues for the general treasury, and the market demand for services. AirTouch believes the balance must be struck in favor of satisfying the market demand. After all, if the Commission imposes a freeze on further growth, other services will pick up the demand and the industry will suffer.

holding up expansions on channels for which there is only one truly interested party.^{9/}

5. Third, AirTouch strenuously opposes the proposal of the Commission to abandon, for grandfathered 931 MHz systems,^{10/} the fixed service area and interference contours that have served the industry so well by limiting interference between co-channel systems and upon which carriers have relied in designing systems. AirTouch finds the proposed formula to be an inaccurate predictor of actual coverage, and its use at this time would not serve the public interest because it could cause interference between systems and would subject paging companies and the Commission to overwhelming paperwork burdens.

6. Finally, AirTouch has serious doubts about the efficacy of the proposed preferences to be accorded to small businesses in the paging auction. Paging is an extremely competitive business in which large and small carriers both have succeeded.^{11/} It also is a

^{9/} See discussion infra at Section III.D.

^{10/} As is discussed within, AirTouch Paging believes that the protection criteria for the 929 MHz band can be conformed to the 931 MHz standards without disrupting the marketplace.

^{11/} Indeed, a substantial number of the large carriers started out as small businesses. This industry is a success for entrepreneurs and
(continued...)

business that has been recognized by the Commission to present low barriers to entry and relatively modest minimum capital requirements.^{12/} Under these circumstances it is not at all apparent that bidding credits or other preferences are necessary or appropriate. The result of such credits may be to unfairly skew an otherwise competitive marketplace in favor of one category of carrier or new entrant over an incumbent.^{13/}

7. As a general rule, the Comments that follow answer the principal questions in the Notice in the order they are posed. The foregoing concerns are developed in greater detail as they arise in response to specific Commission proposals.

^{11/} (...continued)

nothing should be done to disturb the existing business calculus, such as preferences or set-asides.

^{12/}

Because of the low barriers to entry, there has not been a historical bias against applicants on the basis of race or gender -- so the predicate for preferences -- historical bias against applicants or an inability to raise capital -- does not exist.

^{13/}

For instance, if a medium size carrier is the incumbent, and the new applicant is a small business and the small business got a credit, the Commission would be expanding the existing service to the public.

II. The Geographic Licensing Proposal

8. AirTouch agrees with the Commission's tentative conclusion that the public interest will be served by converting all paging channels to geographic licensing that are licensed on an exclusive, non-nationwide basis.^{14/} The Notice properly recognizes that paging services have evolved away from single-site systems towards multi-site systems that cover large geographic areas.^{15/} Under these circumstances, it makes no sense to continue to subject both the applicants and the Commission to the substantial paperwork burdens associated with the licensing of each individual transmitter.^{16/}

9. The Commission proposes that under any geographic licensing scheme adopted in this proceeding, incumbent systems will be entitled to continue operating under existing authorizations with full protection from interference.^{17/} AirTouch strongly

^{14/} Notice, para. 21.

^{15/} A typical system may have 50-100 transmitters covering an entire MTA or multiple MTAs.

^{16/} AirTouch files hundreds of applications a year, and there are inherent delays -- up to 9 months -- in serving the public from new facilities. These all support granting licenses on a market area basis.

^{17/} Notice, para. 22.

concurs with the Commission that this proposal serves the public interest. Because of the number of subscribers that can be served on an existing paging channel, any licensing mechanism that contemplated the loss of incumbents' rights would be extremely disruptive to the existing subscribers. Moreover, unlike other services where there has been a move from site-to-site to market area licensing, there is no demonstrated need for paging carriers to have available to them contiguous spectrum.^{18/} Under these circumstances, protecting existing systems is appropriate.^{19/}

A. Nationwide Channels

10. The Commission proposes to exclude from its market area licensing plan those channels that already

^{18/} In contrast, the record in the 800 SMR market area licensing proceeding demonstrated that carriers could achieve substantial technological advantages and efficiencies if they were able to operate on a contiguous band. This resulted in a process by which incumbents could have their systems relocated to other comparable spectrum. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz frequency Band, PR Docket No. 93-144; RM-8117, RM-8030; RM-8029.

^{19/} AirTouch does, however, endorse the proposal at ¶22 of the Notice, that the operating rights of an incumbent would revert automatically to the geographic licensee if the incumbent fails to construct, discontinues operations, or otherwise has its license terminated by the Commission.

have been assigned to single licensees on a nationwide basis under the existing rules, including the three Part 22 nationwide channels^{20/} and all PCP channels for which licensees have met the construction requirements for nationwide exclusivity as of February 8, 1996.^{21/} AirTouch agrees that the nationwide channels should be unaffected by the move to market area licensing. However, the exclusion should be broader than that proposed by the Commission.^{22/}

11. With regard to the PCP channels, the Commission actually proposes only to exclude those for which licensees had completed constructing qualified nationwide systems as of the adoption date of the Notice.^{23/} AirTouch believes this is unfair to PCP licensees who held, or had applied for, authorizations on February 8, 1996 for a sufficient number of transmitter sites on a particular channel to qualify for nationwide exclusivity and were well on their way

^{20/} 931.8875, 931.9125 and 931.9375 MHz.

^{21/} This was the adoption date of the Notice.

^{22/} AirTouch would support adding MTel's 931.4375 MHz channel to nationwide status so long as the Commission accords other similarly situated licensees the same opportunity for nationwide or multiple MTA licenses.

^{23/} Notice, para. 26.

towards constructing a compliant system when the Notice was adopted.

12. It would constitute an impermissible retroactive modification of licenses for the Commission to prohibit licensees from completing construction and thereby retain exclusivity accorded in the present rules.^{24/} Section 90.495(c) of the PCP exclusivity rules provides:

A proposed paging system that meets the criteria for channel exclusivity under Paragraph (a) of this section will be granted exclusivity under this section **at the time of initial licensing**. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date.^{25/}

This rule section clearly establishes that exclusivity rights vest at the point of initial licensing, and only are divested in the absence of construction. In view

^{24/} Section 316 of the Communications Act of 1934, as amended, protects licensees against an involuntary modification of their license. Case precedent also establishes that retroactive rulemaking is not favored. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208-9 (1988); Kaiser Aluminum & Chemical Corp. v. Bonjuorno, 110 S.Ct. 1570, 1579 (1990) (Scalia, J. concurring); Chester Associates, 2 FCC Rcd. 2029, 2030 (Rev. Bd. 1987).

^{25/} 47 C.F.R. §90.495(c) (emphasis added).

of this explicit rule section, the Commission would be materially adversely modifying the condition of the license were it to preclude existing licensees from retaining exclusivity by completing construction of authorized systems subsequent to the adoption date of the Notice.^{26/}

13. Allowing existing licensees to complete ongoing construction programs and retain exclusivity if they establish a qualifying system on a timely basis also is supported by general considerations of fairness. The PCP exclusivity rules were adopted in 1993 based upon a substantial industry consensus,^{27/} and have only recently been reaffirmed following certain petitions for reconsideration.^{28/} Not

^{26/} In view of the application filing freeze, the Commission will be assured that applicants are not "rolling over" authorizations in order to accord them additional time to construct a sufficient number of transmitters. Basically, within 12 months of the adoption date of the order, nationwide rights will either have perfected or they will have expired.

^{27/} Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-931 MHz, Report and Order, PR Docket No. 93-35, 8 FCC Rcd. 8318 (1993) (the "PCP Exclusivity Order").

^{28/} Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, Memorandum Opinion and Order, PR Docket No. 93-35; RM-7986; FCC 96-53, released 2/13/96.

surprisingly given the relatively recent vintage of PCP exclusivity procedures, many carriers are now in the midst of substantial PCP construction programs.^{29/} Preventing carriers from retaining the exclusivity rights upon which they have based their business plans would be highly disruptive.^{30/} The Commission should, whenever possible, avoid such volatile rule changes that have the effect of discouraging investment in highly successful and competitive businesses. In this case, the move to market area licensing for 929 PCP channels should be prospective in nature and only apply to those frequencies on which PCP licensees exclusivity expires in accordance with current provisions.^{31/}

^{29/} In fact, the rules have never become settled. The rules were immediately reconsidered after their issuance and have been in question for over 2 years. This has had a chilling effect on construction. Now that the rules are settled, the Commission has suggested moving the goal posts.

^{30/} This is especially true when the Commission is preparing to make a local common carrier frequency -- 931.4375 MHz -- nationwide (for which no hope of nationwide licensing was ever held out), while nationwide PCP applicants who reasonably expected nationwide exclusivity, are denied it.

^{31/} This has the potential of allowing the Commission to have nationwide licenses to auction.

B. Shared PCP Channels

14. AirTouch believes that certain shared PCP channels that have extensive regional coverage, or are heavily licensed/loaded, should be subject to market area licensing and exclusivity. For example, AirTouch has a shared PCP 152.48 MHz system^{32/} which rivals many Part 22 exclusive PCP frequency systems in terms of its geographic scope and number of customers.^{33/} The same public interest considerations which led the Commission to adopt an exclusivity plan for certain 929 MHz PCP frequencies support the conversion of VHF and UHF shared PCP channels -- especially 152.48 MHz -- to exclusive use in order to implement geographic licensing.^{34/}

^{32/} The system was acquired from Henry M. Zachs d/b/a Massachusetts-Connecticut Mobile Telephone Service.

^{33/} The systems extends from Maine to Virginia and serves a substantial number of subscribers. AirTouch is Network USA's (now A+ Network) northeast affiliate.

^{34/} Indeed, AirTouch Paging supported the PCIA petition which proposed adopting exclusivity procedures for the lower band channels. See Notice, para. 31. Such a change would be in line with the public interest. AirTouch's 152.48 MHz channel system is licensed similarly to the original proposal for Part 22 nationwide licenses where one company would act as network manager and would have license affiliates in each market.

15. If the Commission determines that it is appropriate to reserve some paging channels for shared use by carriers interested in providing a localized service, the shared 929 MHz frequencies^{35/} are the best candidates. Because there were relatively few systems licensed in the 929 MHz band when the PCP exclusivity rules were adopted,^{36/} carriers interested in providing wide-area service tended to focus their interest on those channels on which they could earn exclusivity on a nationwide, regional or local basis. AirTouch does not believe there are many, if any, wide-area systems licensed on the shared 929 MHz frequencies. Because of this, these channels could provide a useful outlet for continued shared licensing if the Commission determines, based upon the record in this proceeding, that there is a public interest benefit in maintaining channels that are licensed on a shared basis.^{37/}

^{35/} 929.0375, 929.0625, 929.0875, 929.1625 and 929.2625 MHz.

^{36/} Indeed, this is exactly why the Commission reserved these channels. See Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, Report and Order, PR Docket No. 93-35; RM-7986, released November 17, 1993.

^{37/} Indeed, most of the licensing to date on these channels has been by speculators who are now
(continued...)

C. Service Area

16. AirTouch generally agrees that the 47 Rand McNally defined Major Trading Areas ("MTAs")^{38/} provide the most appropriate geographic area boundaries for licensing of all exclusive paging systems.^{39/} MTAs are big enough to accommodate some wide-area systems, but not so big as to exclude smaller carriers from meaningful participation in the marketplace.^{40/} It will, however, be necessary for carriers to aggregate MTAs in order to establish multi-state and larger service areas on a common frequency.^{41/} Therefore, on each particular frequency all MTAs must

^{37/} (...continued)

trying to sell their licenses. The FTC has recently initiated action to stop the application mills which have been applying for these channels.

^{38/} AirTouch Paging is working with the industry association, PCIA, in support of the entry of a blanket copyright license agreement with Rand McNally covering the paging industry.

^{39/} Notice, para. 33. AirTouch suggests that the Commission continue to license shared channels on a transmitter-by-transmitter basis.

^{40/} The public interest trade-offs are as follows: the smaller the area, the less likely the licensee will have any ability to serve the entire customer demand; the larger the area, the more likely some areas will go unserved. Thus, MTAs strike a balance that works well.

^{41/} Indeed, many of these licenses are already held over multiple MTAs by the same licensee.

become available for auction simultaneously to facilitate the aggregation of wider service territories.

17. AirTouch, however, supports the designation of a channel for nationwide licensing if an existing PCP permittee who currently holds an authorization for a sufficient number of locations to qualify for nationwide exclusivity fails to build a compliant system within the construction deadline.^{42/} These channels will have been shielded from other licensing during the construction period, and will be relatively clear of incumbent operations. It makes sense to auction channels of this nature on a nationwide basis.

D. Treatment of Incumbents

18. The Notice tentatively concludes that the public interest is served by allowing incumbents either (a) to continue operating under their existing authorizations, or (b) to trade-in their site specific licenses for a single system wide license, demarcated by the aggregate of the service contours around the incumbent's contiguous sites on the same channel.^{43/} AirTouch agrees with the Commission that this tentative conclusion serves the public interest. In most

^{42/} See Notice, para. 36.

^{43/} Notice, para 37.

instances, licensees would prefer to receive a single system-wide license rather than maintaining the collection of individual site-by-site licenses that now constitutes a wide-area system.^{44/}

19. AirTouch also supports the Commission's tentative conclusion to allow incumbents the flexibility to modify or augment their systems as long as they do not encroach on adjacent operations of a geographic licensee.^{45/} The public interest is always served when a licensee is able to add additional internal sites in a timely manner to satisfy market demand. This support is, however, subject to the required determination of what is an appropriate contour or an internal site.^{46/}

E. Coverage Requirements

20. AirTouch believes that construction requirements serve the public interest by ensuring that licenses are not bought and warehoused. Accordingly, denominating minimum coverage requirements is an

^{44/} In some instances, such as AirTouch's west coast 931 MHz system, AirTouch has at least five call signs for a single system.

^{45/} Notice, para. 38.

^{46/} See discussion in Section II.F below regarding problems with the formulas proposed for calculating service and interference contours for 929 and 931 MHz stations.

appropriate condition to a market area license. The Commission proposes to require coverage to 1/3 of the population within the geographic area within 3 years of the initial license grant, and to 2/3 of the population by the end of 5 years without regard to an incumbent's coverage -- if the market area licensee is different than the incumbent.^{47/} AirTouch agrees with the Commission that the construction requirements are appropriate and serve the public interest.^{48/} However, the public interest also requires that a licensee cover 10% of the population within the first year of service, thereby avoiding a situation in which it takes 3 years for a license to be returned to the public domain by a defaulting carrier.

21. AirTouch strenuously opposes the "alternative" referenced at Paragraphs 41 and 43 of the Notice where a carrier could meet its construction requirements by showing that it provided "substantial service" to the geographic license area with 5 years. This vague standard presents a significant risk that an insincere applicant could preempt an important channel

^{47/} AirTouch interprets the proposal to allow an incumbent market area licensee to use its existing coverage to count towards meeting this coverage requirement.

^{48/} Notice, para. 41.

over a broad geographic area for a considerable period of time with no broad-based service being provided to the public. AirTouch is concerned that such a rule could allow competitors to acquire market area licenses to block expansion of their competitors to ensure that they cannot compete.

22. A substantial service requirement may be appropriate in a service -- such as 900 SMR -- where the marketplace already has exhibited the development of so-called "niche" services.^{49/} AirTouch knows of no such niche or specialized services that have developed in the paging band.^{50/} This being the case, allowing an applicant to acquire the "white space" in a market where it will be incapable of meeting either the near-term or the far-term coverage requirements, serves no public interest objective but does present a significant opportunity for mischief. Speculators could seek to acquire fringe territories in the hope that needs would develop over a 5 year period that

^{49/} For example, several customized wireless data services developed in the 900 SMR band that did not have wide-area applications. This flexibility, however, was not accorded 800 MHz SMR licensees.

^{50/} For the most part, the paging channels are used to provide narrowband messaging over substantial geographic areas. Since virtually all systems are capable of handling the same traffic, niche services do not exist.

would enable them to subject incumbents on the frequency in the MTA to "green mail", or competitors could acquire market area licenses over their competitors to stifle their ability to expand.

23. On balance, the public interest is best served by eliminating the substantial service alternative and requiring all licensees to meet the same construction benchmarks. This conclusion is consistent with the Commission's indication that "regardless of the extent to which their respective service areas are operated by co-channel incumbents, geographic licensees should be responsible for meeting their coverage requirements".^{51/} This worthy proposal of the Commission will be completely undermined by the adoption of a "substantial service" standard.

24. The Notice seeks comment on the sanctions that should apply if a carrier fails to comply with construction requirements.^{52/} AirTouch believes -- regardless of whether the geographic licensee is an incumbent in the market or a newcomer -- that any and all sites constructed after the auction pursuant to the

^{51/} Notice, para. 43. This proposal serves the public interest by requiring market area licensees to use the frequency -- the use of which serves the public interest.

^{52/} Notice, para. 44.

market area license should be forfeited if the construction benchmarks are not met.^{53/} This "death penalty" is necessary to deter speculation. Otherwise, applicants with no bona fide intention of constructing a system meeting the coverage requirements would have nothing to lose by "cherry picking" (i.e., proceeding with construction only in highly populous territories) despite the absence of any serious intent to build a wide area system satisfying the coverage requirements. The Commission found a similar death penalty to be supported by the public interest for narrowband PCS to deter speculation and ensure that spectrum was put to use.^{54/}

F. Co-Channel Interference Protection

25. In the Notice, the Commission proposes to retain existing protection criteria for incumbent licensees.^{55/} Noting, however, some variations in the specific methodologies used to measure interference in different paging services, the Commission is

^{53/} Under this proposal, an incumbent's pre-auction facilities would continue to be protected on a grandfathered basis. This is appropriate because the incumbent met all applicable construction obligations with respect to the stations, and the authorizations were unconditional.

^{54/} 47 C.F.R. §24.103(h).

^{55/} Notice, para. 46.